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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own
Motion to Assess and Revise the Regulation of
Telecommunications Utilities

R.05-04-005
(URF Phase II)

Rulemaking for the Purposes of Revising General Order
96-A Regarding Informal Filings at the Commission

R.98-07-038
(GO 96-A)

**REPLY COMMENTS OF TIME WARNER TELECOM OF CALIFORNIA LP, COX
CALIFORNIA TELCOM, L.L.C., DBA COX COMMUNICATIONS AND XO
COMMUNICATIONS SERVICES, INC. ON THE PROPOSED DECISION OF
COMMISSIONER CHONG CONSOLIDATING PROCEEDINGS, CLARIFYING
RULES FOR ADVICE LETTER UNDER THE UNIFORM REGULATORY FRAMEWORK,
AND ADOPTING PROCEDURES FOR DETARIFFING
(AGENDA ID #6846)**

I. Introduction.

Time Warner Telecom of California, LP (U-5358-C) ("TWTC"), Cox California Telcom, LLC, d/b/a Cox Communications (U-5684-C) ("Cox Communications") and XO Communications Services, Inc. (U-5553-C) (collectively "Joint Commenters") hereby submit these reply comments on the Proposed Decision of Commissioner Chong in the above-referenced consolidated proceedings, identified as agenda item #6846 ("URF II PD").¹

II. The Commission Should Not Adopt Proposed Changes To The URF II PD That Are Not Necessary, Reasonable Or Consistent With Applicable Law.

Filed Rate Doctrine. The URF II PD properly finds that the filed rate doctrine will continue to apply to tariffed services.² And the proposed decision goes on to conclude that the filed rate doctrine will not apply to detariffed services. For this conclusion, the URF II PD (a) relies on Section 495.7(g)³ that expressly states detariffed services will not be subject to limitation of liability provisions in tariff;⁴ and (b) concludes that in a competitive environment the risk of liability will govern carriers' conduct. Nonetheless, DRA requests that the Commission ignore the bright line between tariffed and mandatory detariffed services and eliminate the entire filed rate doctrine and tariffed limitations of liability. DRA's recommendation is misplaced for at least two reasons. First, the filed rate doctrine applies to all tariffed

¹ Joint Commenters are concurrently filing a separate set of reply comments concerning the Proposed Decision Agenda Item #6847 ("GO 96-B PD").

² URF II PD, pp. 61-62.

³ All references are to the California Public Utilities Code, unless otherwise noted.

⁴ PU Code 495.7(g) states in full as follows: "Any telecommunications service exempted from the tariffing requirements of Sections 454, 489, 491, and 495 shall not be subject to the limitation on damages that applies to tariffed telecommunications services."

services, whether filed on a voluntary or mandatory basis.⁵ Second, the Commission does not have the authority to eliminate the filed rate doctrine for tariffed services. When reviewing a challenge to a permissive charge included in a tariff voluntarily filed by a CLEC (i.e. the FCC permitted but did not require the CLEC to file tariffs), a California court relied on a US Supreme Court ruling and rejected the challenge to such permissive charge on the grounds that the filed rate doctrine precluded such claim.⁶ In *AT&T v. Gullivan*, the court reiterated that absent Congressional authorization or direction from the Supreme Court, the courts are not in a position to modify the filed rate doctrine, even in light of a competitive telecommunications industry.⁷ It follows that the Commission cannot eliminate the filed rate doctrine either. Accordingly, the Commission must reject DRA's suggestions.

The Commission Should Not Mandate Contract Language or WebSite Content. Both TURN and DRA⁸ would have the Commission turn contracts for detariffed services into tariff-like documents by mandating carriers include certain information in such contracts. And they would also have the Commission regulate the content on carriers' websites. DRA and TURN's proposals are simply not necessary in light of the numerous safeguards included in the URF II PD and the Commission's Consumer Protection rules and programs. Whereas neither TURN nor DRA provide compelling reasons for the Commission to engage in contract content-regulations, a number of parties demonstrate that URF is intended to free carriers of unnecessary regulatory interference.⁹ Additionally, mandating one-size-fits-all contract language precludes carriers and customers from agreeing to different terms that are to their mutual benefit.¹⁰

Similarly, TURN's and DRA's proposals for the Commission to regulate carriers' website content take a regulatory-laden approach wholly inconsistent with URF. Such an approach is misplaced in that TURN and DRA apparently presume all carriers are bad actors.¹¹ Contrary to this false

⁵ *Gullivan v. AT&T*, 124 Cal.App.4th 1377. A state-filed tariff "when so published and filed, has the force and effect of a statute." *Dyke Water Co. v. Public Utilities Com.* (1961) 56 Cal. 2d 105, 123. Tariffs are the applicable 'law' and 'are binding on the public generally.'" (*Trammell v. Western Union Tel. Co.*, 57 Cal. App. 3d at pp. 550, 551.

⁶ *Gullivan v. AT&T*, 124 Cal.App.4th at 1385.

⁷ *Id.*

⁸ For example, DRA wants the Commission to mandate that contracts for detariffed services inform customers of their rights to file complaints at the Commission. DRA points to PU Code Section 495.7(c)(3)-(6) but does not address existing consumer protection rules that address such issues. For example, GO 168, Rule X requires carriers to include in bills information detailing how a consumer may file a complaint with the Commission. Thus, every month customers are reminded of their rights and how to pursue disputes.

⁹ See, AT&T OC URF II PD, p. 12.

¹⁰ SureWest OC URF II PD, p. 5

¹¹ Joint Commenters recommend that the Commission reject other suggestions premised on carriers being bad actors or acting in bad faith. See, DRA OC URF II PD, pp. 10-11 (recommending the Commission adopt rules allowing for a longer review periods for advice letters on the grounds the 150 day period will encourage carriers not to respond to discovery; limiting the amount of services a carrier can detariff because of potential hidden violations; and proposing significant penalties for misfiling an advice letter). For example, DRA suggests that the Commission impose significant penalties on carriers that improperly file an advice letter. This suggestion assumes carriers will

presumption, the competitive marketplace will ensure that carriers readily disclose useful information to consumers. Rather than hiding information from consumers, carriers seeking to gain new customers will display accessible and useful information about their available services and options. In the competitive marketplace where consumers have choices, carriers will look to entice consumers to become customers, and thereafter, to upgrade or add additional services.

The URF II PD details all the steps the Commission has taken to eliminate unnecessary regulation and that consumer safeguards are adequate.¹² DRA's and TURN's proposals are out of synch with a lighter regulatory environment. Adding in regulatory requirements for contracts and websites will defeat the Commission's goals of establishing a regulatory approach that, "to the highest degree possible" is consistent with the competitive marketplace.¹³

ICB Contracts. DRA proposes a rule that would require carriers to post ICB contracts for both tariffed and detariffed services on their websites to ensure that carrier's rates and services do not become invisible.¹⁴ This proposal is misplaced because regulatory-like filing requirements are inconsistent with detariffing. A key benefit of detariffing is carriers having the flexibility to distinguish themselves in the marketplace without regulatory burden and delay. A second critical component of detariffing is the Commission taking a lighter regulatory approach, and thereby, imposing fewer regulatory requirements. Requiring carriers to post all contracts for detariffed services would be a huge administrative undertaking and would significantly undermine the benefit of offering services on a detariffed basis. The Commission must reject DRA's attempts to treat detariffed services in the same manner as tariffed services.

Contracts of Adhesion. DRA recommends that the Commission adopt rules protecting consumers against adhesion contracts.¹⁵ Additional regulatory oversight is not necessary here as applicable law prohibits adhesion contracts that include unconscionable provisions.^{16 17} Further, the Commission recently adopted consumer protection rules and found that "there already are significant consumer protection laws and rules that protect our State's consumers from abusive telecommunications

knowingly violate the Commission rules. It ignores the fact that carriers do and will continue to file advice letters in good faith in the right tier but that mistakes may happen. The Commission should not adopt rules premised on an unsupported allegation that carriers will knowingly file advice letters in the wrong tier and seek to avoid answering data requests issued by the Communications Division.

¹² URF II PD, pp. 8-9.

¹³ Id, p. 8.

¹⁴ DRA OC URF II PD, pp. 9-10.

¹⁵ Id, p. 13.

¹⁶ California Civil Code § 1670.5 states in part: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

¹⁷ The courts have recognized that there is nothing inherently wrong with an adhesion contract, "Adhesion contracts 'are, of course, a familiar part of the modern legal landscape.... They are also an inevitable fact of life for all citizens-businessman and consumer alike.'" *Intershop Communications AG v. Superior Court* 104 Cal.App.4th 191, 201 (2002) (citing *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817-18 (1981)).

carriers.”¹⁸ Accordingly, there is no basis for adopting additional regulation concerning adhesion contracts in this proceeding.

Applicable Law Applies To Both Detariffed Services and Tariffs Services. DRA suggests that certain tariffed terms should apply to detariffed services.¹⁹ This suggestion is misplaced in that it presumes that the tariff is the source of a given requirement and not applicable law. For example, GO 153 requires carriers offering residential basic service to inform customers of Lifeline service. This requirement applies without regard to whether it is captured in a tariff.²⁰ Similarly, PU Code section 2883 details carriers warm line obligations. Again, these obligations apply whether or not they are detailed in a carrier’s tariff. Thus, there is no need for the Commission to require terms in a tariff to apply to services that are detariffed.

III. The Commission Should Adopt Certain Proposed Revisions to URF II PD.

Joint Commenters have reviewed the comments of all parties and support the following well-reasoned recommendations:

Requirements Under Applicable Law Should Not Be Subject To Tariffs. Joint Commenters strongly agree with AT&T, Verizon and SureWest that the Commission should eliminate the confusing language that precludes a carrier from withdrawing tariffs that contain obligations under state and federal law.²¹ Instead, the Commission should prohibit the withdrawal of tariff provisions that applicable law expressly requires be included in a tariff.²² As AT&T correctly notes, carriers have numerous obligations under applicable law but all such obligations are not subject to tariff filings. Joint Commenters also support CALTEL’s proposed clarification that Rule 5.2 refer to services that are subject to the Commission’s jurisdiction (and not “any service available to the public”).²³

Similarly, DRA recommends that the Commission clarify what is meant by the prohibition on detariffing access to 911 or emergency services.²⁴ The proposed decision does not address this requirement in detail and it is not clear if it refers to carriers providing consumers access to 911, services provided to Public Safety Answering Points (“PSAPs”) or some other form of emergency service. As noted above, PU Code section 2883 imposes certain obligation with respect to access to 911 and this obligation stands without respect to a carrier offering tariffed or detariffed services. Further, residential

¹⁸ D.06-03-013, p. 39.

¹⁹ DRA OC URF II PD, p. 14.

²⁰ Joint Commenters understand that the URF II PD does not permit carriers to detariff basic service.

²¹ URF II PD, pp. 51-52.

²² See, ATT OC URF II PD, pp. 6-7; Verizon OC GO 96-B PD, p. 8; SureWest OC URF II PD, 5.

²³ CALTEL OC, pp. 5-6.

²⁴ DRA OC URF II PD, p. 14. See URF II PD, p. 52.

basic service, as defined in D.96-10-066, will remain tariffed and includes access to 911, and therefore, it's not necessary to call it out separately.²⁵

Joint Commenters further submit this clarification is necessary to avoid any confusion about carriers detariffing services or features associated with emergency services. For example, DRA questions whether carriers may detariff call waiting or a distinctive ringing feature that may be utilized with emergency services.²⁶ DRA's suggestion demonstrates the need for clarification on this matter. Specifically, carriers are not obligated to offer these or any other optional services via a tariff. To avoid potential disputes on this matter, the Commission should modify the URF II PD to refer to 911 service offered to PSAPs and state carriers are not required to tariff any optional calling features or functions.

18-Month DeTariffing Window. A number of parties recommend that the Commission eliminate the 18-month period for detariffing and allow carriers to detariff as they see fit on a going – forward basis. Joint Commenters strongly agree that the 18-month period is arbitrary and not supported by the record.²⁷ As SureWest correctly notes, the 18-month period was the time period carriers stated they would need to comply with any mandatory detariffing.²⁸ It does *not* follow that permissive detariffing should be limited to an 18-month period.

Requirement to WebPublish Terms and Conditions Should Be Limited To Services Offered to Residential Customers. CALTEL recommends that the web publishing requirement apply only to services offered to residential services. CALTEL is correct in stating that (1) business customers are sophisticated and do not require the same safeguards as residential consumers; and (2) the administrative burden of web publishing and archiving complex and often fast-changing rates, terms and conditions for complex commercial services would likely eliminate a key benefit of detariffing and weigh heavily against carriers taking advantage of the detariffing option. Joint Commenters urge the Commission to adopt CALTEL's recommendation and eliminate the web publishing requirement for business services.

Maintaining Archive of Services Posted on Websites. The Commission did not provide any rationale for, and therefore, it should not require carriers to “publish” a three-year archive of services on their websites. Joint Commenters strongly support AT&T and Verizon's recommendation that carriers maintain such information and provide it to consumers upon request.²⁹

IV. Conclusion.

Joint Commenters recommend that the Commission modify the URF II PD consistent with both their reply and opening comments.

²⁵ To the best of Joint Commenters' knowledge, carriers do not offer a separately tariffed service referred to as “911 service.”

²⁶ DRA OC URF II PD, p. 14.

²⁷ See CALTEL OC URF II PD, p. 7. Citizens OC URF II PD, pp. 1-2; SureWest OC URF II PD, pp. 3-4

²⁸ SureWest OC URF II PD, pp. 2-3.

²⁹ AT&T OC URF II PD, pp. 7-9; Verizon OC URF II PD, p. 3.

Dated: August 20, 2007

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Respectfully submitted,
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I, Margaret L Tobias, the undersigned, hereby declare that, on August 20, 2007, caused a copy of the foregoing:

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COMMUNICATIONS SERVICES, INC. ON THE PROPOSED DECISION OF
COMMISSIONER CHONG CONSOLIDATING PROCEEDINGS, CLARIFYING
RULES FOR ADVICE LETTER UNDER THE UNIFORM REGULATORY FRAMEWORK,
AND ADOPTING PROCEDURES FOR DETARIFFING
(AGENDA ID #6846)**

in the above-captioned proceeding, to be served as follows:

[X] Via email and US Mail to the Assigned Commissioner's Advisor

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[X] Via email and US Mail to the Administrative Law Judge Kotz

[X] Via email to all parties, as set forth in the attached service list

Dated: August 20, 2007 at San Francisco, California.

/s/

Margaret L. Tobias

SERVICE LIST

Proceeding: R0504005 - CPUC - PAC BELL, VER
Filer: CPUC - FRONTIER COMMUNICATIONS OF CALIFORNIA
List Name: INITIAL LIST
Last changed: August 9, 2007

Proceeding: R9807038 - PUC-GENERAL ORDER 96
Filer: CPUC - GENERAL ORDER 96-A
List Name: INITIAL LIST
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